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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

LARRY R. WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a suit by the Federal Election Commission to obtain an injunction against future violations of the Federal Election Campaign Act is subject to the statute of limitations that applies to an "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" (28 U.S.C. 2462).

2. Whether, when a defendant fraudulently conceals willful violations of federal campaign contribution limitations, the Federal Election Commission is deemed, as a matter of law, to have notice sufficient to commence the running of the statute of limitations from routine reports filed with it that do not disclose the violations.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Federal Election Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 104 F.3d 237. The opinions of the district court (App., *infra*, 15a-20a, 21a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1996. A petition for rehearing was denied on June 5, 1997. On August 15, 1997, Justice

O'Connor extended the time for filing a petition for a writ of certiorari to October 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 2 U.S.C. 437g(a)(6)(A) provides, in relevant part:

> If the Commission is unable to correct or prevent any violation of this Act * * * by the [conciliation] methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

2. 2 U.S.C. 437g(a)(6)(C) provides, in relevant part:

> In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act * * * , the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

3. 28 U.S.C. 2462 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

STATEMENT

1. The Federal Election Campaign Act prohibits individuals from making contributions "to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000." 2 U.S.C. 441a(a)(1)(A). The Act further prohibits individuals from "mak[ing] a contribution in the name of another person or knowingly permit[ting] his name to be used to effect such a contribution." 2 U.S.C. 441f. A "contribution[] in the name of another" includes "[g]iving money * * * which was provided to the contributor by another person * * * without disclosing the source of [the] money." 11 C.F.R. 110.4(b)(2)(i). In applying these limitations, "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are * * * directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate." 2 U.S.C. 441a(a)(8).

The Federal Election Commission is an independent agency that Congress has vested with "primary and substantial responsibility for administering and

enforcing the Act." *Buckley* v. *Valeo*, 424 U.S. 1, 109 (1976). The Commission is authorized to institute investigations when "it has reason to believe that a person has committed, or is about to commit, a violation" of the Act. 2 U.S.C. 437g(a)(2). If the Commission determines that a violation of the Act has been committed, or is about to be committed, the Commission is then to attempt, "for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion" (2 U.S.C. 437g(a)(4)(A)(i)). If the Commission is unable to correct or prevent any violation of the Act through such informal conciliation, it may then commence an action in federal district court seeking any of the following relief (2 U.S.C. 437g(a)(6)(A)):

> a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) * * * .

In any case involving a willful violation of the Act, "the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation." 2 U.S.C. 437g(a)(6)(C).

2. In an effort to raise funds for the presidential campaign of Jack Kemp in 1987, respondent Larry Williams devised a scheme to circumvent the federal limitations on campaign contributions. The Kemp campaign was sponsoring a fundraising promotion that allowed any individual who contributed $1,000 to purchase a ticket to the Super Bowl for $100.

Respondent purchased a large number of Super Bowl tickets at $100 apiece and "gave those tickets to people whom he persuaded to contribute $1000 to Kemp's campaign" (App., *infra*, 2a). In 22 instances, however, "Williams 'advanced' $1000 to the contributor" and then "later resold the tickets and recovered the sums advanced" (*ibid.*). Respondent thus violated 2 U.S.C. 441f by personally contributing in excess of $22,000 to the Kemp campaign through the use of others as his proxies (App., *infra*, 18a-19a). In arranging and executing this scheme, respondent was aware of the federal campaign contribution limitations and knowingly violated them (*id.* at 18a-19a & n.1).

Respondent's scheme required the contribution checks to the Kemp campaign to be issued by the individuals who Williams reimbursed, rather than by Williams himself. The disclosure reports filed with the Federal Election Commission by the Kemp campaign committee thus revealed the names and addresses of the 22 donors but provided no indication that Williams had reimbursed these individuals for the contributions. See S.E.R. 109-134.[1]

3. On September 12, 1988, a former employee of respondent named Richard Hooton filed a sworn administrative complaint with the Federal Election Commission. The complaint alleged that respondent had made illegal campaign contributions. Prior to receiving that complaint, the Commission had no "reason to suspect Williams's involvement in [the 22 individual] contributions" (App., *infra*, 11a (Fletcher, J., dissenting)). When informed of Hooton's charges,

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[1] "S.E.R." refers to the Supplemental Excerpts of Record filed with the Commission's brief in the court of appeals.

respondent denied them, stating that they were the "wild allegations" of a "disgruntled" former employee (S.E.R. 11-17).

4. a. After an investigation and attempted conciliation of the violations—as required by 2 U.S.C. 437g(a)(2) and (4)—the Commission brought this civil enforcement action against respondent in federal district court on October 19, 1993. The Commission sought a monetary civil penalty for respondent's past willful violations of the Act (2 U.S.C. 437g(a)(6)(C)) and an injunction barring any future violations (2 U.S.C. 437g(a)(6)(A)).

b. Respondent moved to dismiss the complaint, contending that the Commission's suit was barred by 28 U.S.C. 2462. That statute specifies that, "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued" (*ibid.*).

The district court denied the motion to dismiss. The court noted that Congress had provided a three-year limitation period for criminal enforcement actions under the Federal Election Campaign Act (2 U.S.C. 455) but had specified "no time limit for civil actions" (App., *infra*, 25a). The court stated that this "was not a mistake or an oversight" but instead reflected a legislative intent that there be "no time limit on FECA civil actions" (*ibid.*). The court concluded that "the catchall statute of limitations" of 28 U.S.C. 2462 is therefore inapplicable to civil suits to enforce the federal campaign contribution laws (App., *infra*, 26a).

c. On the merits, the district court granted judgment to the Commission. The court found that respondent's scheme plainly violated the campaign contribution limitations and that "there is no doubt [respondent] knew of the Act's prohibitions" (App., *infra*, 19a). The court concluded that "[t]his is sufficient to establish willfulness under the Act" and therefore imposed a civil penalty against respondent "in the amount of $10,000" (*ibid.*). See 2 U.S.C. 437g(a)(6)(C). Noting that respondent, in the face of clear evidence of his actions, expressed the "continuing belief he committed no wrong-doing," the court also enjoined respondent "from similar violations of the Act for a period of 10 years" (App., *infra*, 19a-20a).

5. a. The court of appeals reversed (App., *infra*, 1a-9a), with one judge dissenting (*id.* at 9a-14a). The majority held (*id.* at 3a-5a) that the statute of limitations contained in 28 U.S.C. 2462 applies to this case because the Commission's suit is an "action * * * for the enforcement of [a] civil * * * penalty" (*ibid.*). The majority rejected the Commission's contention that this statute of limitations—which, by its terms, applies to suits to enforce civil penalties—"does not apply to actions for injunctive relief" (App., *infra*, 5a). The court stated (*ibid.*):

> This assertion runs directly contrary to the Supreme Court's holding in *Cope v. Anderson*, 331 U.S. 461, 464 (1947). *Cope* holds that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." In other words, because the claim for injunctive relief is connected

to the claim for legal relief, the statute of limitations applies to both.

The majority also rejected the Commission's argument that, if this statute of limitations applies to this case, it was nonetheless tolled by respondent's fraudulent concealment of his unlawful acts. The majority agreed that the limitations period imposed by 28 U.S.C. 2462 "is subject to equitable tolling" when the material facts have been fraudulently concealed by the defendant (App., *infra*, 7a, citing *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946)). The court also did not doubt that respondent's scheme involved a fraudulent concealment of the facts. The court stated, however, that a plaintiff relying on this tolling doctrine must establish that it exercised "due diligence" to discover the facts. The court concluded that the Commission could not meet that requirement in this case because, in the court's view, the federal "campaign finance reporting requirements are, as a matter of law, sufficient to give FEC 'notice of facts that, if investigated, would indicate the elements of a cause of action'" (App., *infra*, 7a). The court stated that there is "no allegation" that the campaign finance reports filed in connection with respondent's activities "contained false information," and it concluded that the Commission, "through a duly diligent exercise of its investigatory power, * * * could have discovered the operative facts giving rise to this suit" (*id.* at 8a). See note 6, *infra*.

b. Judge Fletcher dissented (App., *infra*, 9a-14a). She accepted without comment the conclusion of the majority that the statute of limitations in 28 U.S.C. 2462 applies to actions to impose civil penalties under the Federal Election Campaign Act. She also did not

address the majority's conclusion that this statute of limitations applies equally to the Commission's request for an injunction as to its request for civil penalties. She disagreed with the majority, however, in the application of the doctrine of equitable tolling to this case.

Judge Fletcher concluded (i) that the statute of limitations was tolled in this case by the fraudulent concealment of facts by respondent and (ii) that the disclosure reports on which the majority relied could not commence the running of the limitations period because those reports, in fact, "prevent[ed] discovery of that violation" by the Commission (App., *infra*, 10a). Judge Fletcher noted that the majority's contrary conclusion "in effect imposes a duty on the FEC to investigate every report even though nothing on its face indicates illegal activity, or else risk being barred by the statute of limitations when a violation comes to light" (*id.* at 11a). She stated (*id.* at 12a):

> If the statute of limitations is not equitably tolled in penalty proceedings involving the kind of violation that was committed in this case, the result will be a perverse reward for violators of the campaign-finance laws: those who are most clever in deceiving the FEC and concealing their illegal contributions will be the least likely to be prosecuted successfully, since their violations will take the longest time to come to light.

Judge Fletcher concluded that "[e]quitable tolling is proper in this case" because, "'without any fault or want of diligence or care', the FEC did not disover Williams's fraud until the complaint against him was made to the FEC in September 1988" (App., *infra*,

10a). She explained that the action was timely because the statute of limitations (i) was first tolled by respondent's fraudulent concealment of the facts until the administrative complaint was filed and (ii) was then further tolled during the period that mandatory notice and conciliation efforts were conducted pursuant to 2 U.S.C. 437g(a)(4)(A) (App., *infra*, 12a-14a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals creates a conflict among the circuits on recurring issues of substantial importance to the enforcement of numerous federal laws. The decision also creates significant obstacles to enforcing the Federal Election Campaign Act against persons who evade its requirements and conceal their conduct by causing the filing of reports that disclose what appear to be lawful contributions. Review by this Court is therefore warranted.

1. Congress has specified that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued" (28 U.S.C. 2462). This case involves whether that statute of limitations applies to suits in equity brought by the United States to obtain an injunction barring future violations of a substantive statutory prohibition. The Ninth Circuit held in this case that, when the "claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both" (App., *infra*, 5a). The Eleventh Circuit, by contrast, has expressly rejected the reasoning of the Ninth Circuit in this case and has concluded that "[t]he plain language of section 2462 does not apply to equitable

remedies." *United States* v. *Banks*, 115 F.3d 916, 919 & n.6 (1997).

The decision in the present case thus creates a conflict on a recurring, important question of federal law. Moreover, in holding that 28 U.S.C. 2462 applies not only to suits brought to obtain "enforcement of any civil fine, penalty, or forfeiture" (*ibid.*) but also to suits in equity to enjoin future violations of the law, the court of appeals has fundamentally misapplied the decisions of this Court.

a. The plain language of 28 U.S.C. 2462 provides a limitations period only "for the enforcement of any civil fine, penalty, or forfeiture" (*ibid.*). Nothing in that text states or implies that the statute governs the availability of injunctive relief. As the Eleventh Circuit correctly concluded, "[t]he plain language of section 2462 does not apply to equitable remedies." *United States* v. *Banks*, 115 F.3d at 919. Accord, *FEC* v. *National Republican Senatorial Comm.*, 877 F. Supp. 15, 21 (D.D.C. 1995) ("appl[ying] the § 2462 statute of limitations to both legal and equitable relief * * * is contrary to the express language of the statute").

The fact that the statute of limitations does not apply by its terms to suits for injunctive relief is dispositive of the question whether it bars such suits by implication. This Court "long ago pronounced the standard: 'Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government.'" *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984), quoting *E. I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924). As the Eleventh Circuit concluded in *United States* v. *Banks*, the "canon of statutory construction that any statute of limitations

sought to be applied against the United States must receive a strict construction in favor of the Government" requires the conclusion that 28 U.S.C 2462 applies, as its text reflects, "only to civil penalties" and does not bar claims for injunctive relief. 115 F.3d at 919.

The principle that a statute of limitations must be express in limiting suits by the government applies even when, as in the present case, the government has two remedies that stem from the same substantive right.[2] This Court has consistently held that, when a statute of limitations expressly limits only one of two alternative remedies, the other is *not* barred by implication. *United States* v. *Whited & Wheless*, 246 U.S. 552, 564 (1918). The doctrine "that where there are two remedies for the protection of a right one may be barred and the other not, is no novelty in the law." *Id.* at 564. The Court has emphasized that this general principle has particular force in cases involving the remedies of the United States, for it is (*id.* at 561) (citation omitted)

> settled "as a great principle of public policy" that the "United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has

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[2] The Commission is authorized by 2 U.S.C. 437g(a)(6)(A) to "institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty * * *)." The Federal Election Campaign Act contains a statute of limitations on criminal enforcement, 2 U.S.C. 455, but contains no limitation for civil actions brought to obtain either the injunctive relief or the civil penalties authorized by Section 437g(a)(6)(A). See App., *infra*, 26a.

clearly manifested its intention that they should be so bound" * * * .

The rule requiring "a restrictive, a strict, construction" of statutes that "bar the rights of the Government" (*United States* v. *Whited & Wheless*, 246 U.S. at 561) thus requires that 28 U.S.C. 2462 not be interpreted to exclude remedies other than those that the statute particularly and expressly encompasses. This statute of limitations is directed, by its terms, only to suits "for the enforcement of any civil fine, penalty, or forfeiture" (*ibid.*). An injunction against future violations of law is not a "fine, penalty or forfeiture" for past violations and therefore does not fall within the plain language of the statute. In the present case, as in *Whited & Wheless*, because the "statute of limitations did not create the right of action * * * or either of the remedies * * * and in terms applies only to one remedy," the second remedy is not barred (246 U.S. at 561, 564).

This conclusion would seem especially obvious when, as in the present case, the alternative remedy is an equitable one. It has long been established that statutes of limitation govern only legal rights; they do not control the availability of equitable relief. As this Court explained in *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946) (emphasis added):

> *Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief.* Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as

> to make a decree against the defendant unfair. * * *
>
> Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." * * * *And so, a suit in equity may lie though a comparable cause of action at law would be barred.*

b. In concluding that 28 U.S.C. 2462 governs equitable relief, as well as suits "for the enforcement of any civil fine, penalty, or forfeiture," the court of appeals did not discuss (or even cite) any of these decisions of this Court. Instead, the court of appeals relied exclusively on the statement in this Court's decision in *Cope* v. *Anderson*, 331 U.S. at 464, that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy" (App., *infra*, 5a). The court of appeals believed that, under the "concurrent" remedy doctrine, "because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations is applicable to both" (*ibid.*).

The court of appeals erred in its understanding of *Cope* and of the "concurrent" remedy doctrine. In *Cope*, the receiver of a failed national bank brought an action in equity for monetary relief, seeking to enforce the assessed liability of the bank's stockholders pursuant to the National Bank Act. Although the receiver could have brought multiple suits at law against each individual stockholder, he was permitted

to bring a single action in equity that consolidated the claims against all of the shareholders. 331 U.S. at 463. The Court concluded in *Cope* that this "concurrent" equitable proceeding should not be permitted to proceed because the statute of limitations would bar the same relief if sought in separate legal actions against the individuals. *Id.* at 464.

The court of appeals erred for two reasons in relying on *Cope* in this case. First, *Cope* involved litigation between private parties in which the rule of strict construction of statutes of limitation asserted against the government was not implicated. As the Eleventh Circuit stated in criticizing the opinion in the present case, the court of appeals erred in relying on *Cope* by "fail[ing] to distinguish between the application of the statute of limitations to the United States in its private versus its sovereign capacity." *United States* v. *Banks*, 115 F.3d at 919 n.6.

The court of appeals also erred in assuming that the "concurrent" remedy doctrine discussed in *Cope* has any application to this case. That doctrine does not, as the court of appeals incorrectly stated, apply to the ordinary situation in which "the claim for injunctive relief is connected to the claim for legal relief" (App., *infra*, 5a) simply in the sense that the two remedies are available for the same misconduct. Instead, the "concurrent" remedy doctrine describes the situation in which, as in *Cope*, the equity court acts merely in aid of the legal remedy and is not exercising its "exclusive" equitable jurisdiction.

Equity courts have long recognized a distinction between their "concurrent jurisdiction" and their "exclusive jurisdiction." The "concurrent jurisdiction" of equity courts refers to those situations in which the "law must, through its judicial procedure,

give *some* remedy of the same general nature as that given by equity, but this legal remedy is not, under the circumstances, full, adequate, and complete." 1 *Pomeroy's Equity Jurisprudence* § 139, at 191-192 (5th ed. 1941). By contrast, injunctive relief of the type sought in the present case is part of equity's "exclusive jurisdiction," not its "concurrent jurisdiction" (*id.* § 136, at 186; *id.* § 138, at 189):

> This distinction or opposition between the "exclusive" and the "concurrent" relates wholly to the nature and form of the remedies which are administered by equity courts * * *. [R]emedies granted may be of a kind which are peculiar to equity courts, such as reformation, cancellation, injunction * * *.
>
> * * * Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must * * * belong to the *exclusive* jurisdiction of equity, even though the primary right * * * is one which courts of law recognize, and * * * give *some* remedy. * * * [T]he particular fact or event which occasions the peculiar equitable remedy * * * may also be the occasion of a legal remedy * * *. These * * * cases cannot, however, be regarded or treated as belonging to the concurrent jurisdiction * * *. The criterion which I have given is always simple and certain in referring to the exclusive jurisdiction all cases in which the remedy is given by courts of equity alone, without regard to the nature of the substantive right which forms the basis of the action * * *.

This Court has recognized and applied this distinction between the concurrent and exclusive jurisdiction of equity courts. In *Russell* v. *Todd*, 309 U.S. 280, 289 (1940), the Court explained that "when * * * the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the * * * statute of limitations." "But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, * * * statutes of limitations barring actions at law are inapplicable." *Ibid.* See also *Holmberg* v. *Armbrecht*, 327 U.S. at 396. In the present case, as in *Russell* v. *Todd*, 309 U.S. at 289, "the equity jurisdiction is exclusive" because the remedy sought is not available at law. The "statutes of limitations barring actions at law are [therefore] inapplicable." *Ibid.*

The "concurrent" remedy doctrine described in *Cope* thus has no application to the action brought by the Commission to obtain prospective injunctive relief in this case. In *Cope*, the Court explained that "it is only the *scope* of the relief sought and the multitude of parties sued which give equity *concurrent jurisdiction* to enforce the legal obligation." 331 U.S. at 463-464 (emphasis added). The claim at issue in that case—involving the assessed monetary liability of the stockholders—did not arise in equity. Instead, it involved enforcement of a legal right. The jurisdiction of the equity court in *Cope* derived solely from its ability to bring the entire class of stockholders into a single proceeding. See 1 *Pomeroy's Equity Jurisprudence*, *supra*, §§ 174, 175, 181, 243. Equity was invoked in *Cope* to "enforce the legal obligation" (331 U.S. at 464), not to provide a remedy that was exclusively within its jurisdiction. It is only when equitable jurisdiction is invoked to "enforce the

legal obligation" that the equity court is to "withhold its relief" when the statute of limitations on the legal claim has expired. *Ibid.* Accord, *Russell* v. *Todd*, 309 U.S. at 289.

In the present case, the prospective injunctive relief sought by the government was an exclusively equitable, rather than concurrent, remedy. The government's "suit in equity [therefore] may lie though a comparable cause of action at law would be barred." *Holmberg* v. *Armbrecht*, 327 U.S. at 396.[3]

c. The question presented in this case has substantial recurring importance. Numerous statutes specifically authorize government agencies to obtain civil penalties for past violations and injunctive relief

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[3] The courts of appeals are divided in their understanding of this traditional distinction between the concurrent and exclusive jurisdiction of equity courts. Some circuits have applied the same erroneous understanding of the "concurrent" remedy doctrine that the court of appeals adopted in this case. See, *e.g.*, *Nemkov* v. *O'Hare Chicago Corp.*, 592 F.2d 351, 355 (7th Cir. 1979) (if the "sole remedy is not in equity and an action at law can be brought on the same facts, the remedies are concurrent"); *Swan* v. *Board of Higher Educ.*, 319 F.2d 56, 59-60 n.5 (2d Cir. 1963) (plaintiff "is not here asserting 'a federal right for which the sole remedy is in equity,' * * * and hence the situation is one of 'concurrent' legal and equitable jurisdiction").

Other courts, however, have correctly applied the "concurrent" remedy rule. See *Gruca* v. *United States Steel Corp.*, 495 F.2d 1252, 1257-1258 (3d Cir. 1974) ("although plaintiff's demand for legal and equitable relief arises out of the same factual complex, it does not necessarily follow that the jurisdiction of equity is 'concurrent' with that of law, as that word is used in *Russell* v. *Todd*); *FEC* v. *Christian Coalition*, 965 F. Supp. 66, 70-72 (D.D.C. 1997) (under the principles of *Cope* and *Russell*, 28 U.S.C. 2462 does not bar the government's claim for equitable relief).

barring future violations.[4] The proper application of the statute of limitations for actions to enforce a "civil fine, penalty, or forfeiture" (28 U.S.C. 2462) to the injunctive relief authorized by these statutes is an issue that is frequently litigated and on which the courts have frequently disagreed. Compare, *e.g.*, *FEC* v. *Christian Coalition*, 965 F. Supp. 66 (D.D.C. 1997) (Section 2462 does not bar agency claim for injunctive relief); *United States* v. *Hobbs*, 736 F. Supp. 1406 (E.D. Va. 1990) (same), with *FEC* v. *National Right To Work Committee*, 916 F. Supp. 10 (D.D.C. 1996) (Section 2462 does bar agency claim for injunctive relief); *United States* v. *Telluride Co.*, 884 F. Supp. 404 (D. Colo. 1995) (same). Review by this Court is warranted to resolve the conflict that exists among the courts of appeals on this important recurring question.

2. The court of appeals correctly acknowledged that, to the extent that 28 U.S.C. 2462 applies to this case, the statute of limitations "is subject to equitable tolling" because of the fraudulent concealment of facts by respondent (App., *infra*, 7a). As the court explained (*id.* at 6a-7a):

> The doctrine of equitable tolling provides that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or

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[4] Many statutes authorize government agencies to obtain both civil penalties and injunctive relief to protect the public. See, *e.g.*, 15 U.S.C. 45(*l*) (Federal Trade Commission to prevent unfair trade practices); 21 U.S.C. 134e (Secretary of Agriculture to prevent spread of disease); 29 U.S.C. 212(b), 216(e), 217 (Secretary of Labor to enjoin and punish violations of child labor laws); 42 U.S.C. 2280, 2282 (Nuclear Regulatory Commission to enforce rules concerning the handling of nuclear material).

> want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. . . ." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (internal quotations omitted). "This equitable doctrine is read into every federal statute of limitation." *Id.*

See also *Exploration Co.* v. *United States*, 247 U.S. 435 (1918); *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342 (1874).[5]

The court of appeals erred, however, in its application of the doctrine of equitable tolling to the present case. The court noted that a party that contends that the statute of limitations is tolled by fraudulent concealment of facts must establish that it exercised "due diligence" to discover those facts (App., *infra*, 7a). The court held that the Commission could not meet that requirement in this case because, in the court's view, the federal "campaign finance reporting requirements are, as a matter of law, sufficient to give FEC 'notice of facts that, if investigated, would indicate the elements of a cause of action'" (*ibid.*). The court concluded that, "through a duly diligent exercise of its investigatory power, [the Commission] could have discovered the operative facts giving rise to this suit" (*id.* at 8a).

This holding is premised upon a fundamental misunderstanding of the investigatory powers of the

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[5] In *Bailey* v. *Glover*, 88 U.S. (21 Wall.) at 349-350, the Court stated that "when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered * * *."

Commission. It incorrectly presupposes that the Commission has the authority, and the resources, "to investigate every report, even though nothing on its face indicates illegal activity" (App., *infra*, 11a) (Fletcher, J., dissenting). Moreover, the court's holding would provide "a perverse reward for violators * * * who are most clever in deceiving the [Commission] and concealing their illegal contributions" (*id.* at 12a) (Fletcher, J., dissenting). Review by this Court is warranted to avert the substantial threat that this holding creates for the legitimate enforcement activity of the Commission.

a. The Federal Election Campaign Act imposes an obligation on the treasurer of a political committee to report the name, address, occupation, and employer of any donor who gives more than $200 in a single year. 2 U.S.C. 431(13), 434(b)(3)(A). "Neither the Act nor any other law * * * requires donors [themselves] to disclose this information." *Republican National Comm.* v. *FEC*, 76 F.3d 400, 403 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 682 (1997). If the treasurer exercises "best efforts" to obtain and report this information, the committee's disclosure reports will comply with the Act even if identifying information is missing. 2 U.S.C. 432(i). When, as in the present case, an unlawful contribution is made through a conduit, the treasurer of the recipient committee may have no reason to suspect the violation. In the absence of any reason for the treasurer to believe that the conduit was not the actual source of the contribution, the disclosure report will reflect an apparently lawful contribution from the conduit.

In the present case, for example, the Kemp committee's reports disclosed the names and addresses of the 22 individuals but contained no information that

would cast suspicion on the lawfulness of the contributions. S.E.R. 109-134. If, as the court of appeals held in this case, such routine and uninformative reports preclude tolling of the statute of limitations, it is difficult to imagine circumstances in which the fraudulent concealment doctrine could be applied to campaign contribution violations.[6] As the dissent correctly concluded, the statute of limitations was tolled by respondent's fraudulent concealment of the truth because, "'without any fault or want of diligence or care', the [Commission] did not discover Williams's fraud until the [administrative] complaint against him was made * * * in September 1988" (App., *infra*, 10a).[7]

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[6] The court of appeals stated, without any explanation, that "[t]here is no allegation that the 22 contributions by Williams' employees and friends were not listed in the campaign reports, *or otherwise contained false information*" (App., *infra*, 8a) (emphasis added). It is the very essence of the Commission's position, however, that reporting the contributions as if they were from the 22 individuals when, in fact, they were from respondent is "false information." That the Kemp committee was presumably unaware of the false facts contained in its reports does not mean that the reports did not "contain[] false information."

[7] Under the doctrine of fraudulent concealment, the period of limitations was further tolled when, in response to the administrative complaint, Williams urged the Commission to take no action because Hooton was a "former, and disgruntled, employee" who filed a "sour grapes" complaint (S.E.R. 11-13). A year later in September 1989, Willliams asserted that Hooton would "recant his previous testimony," which Williams characterized as "wild allegations" (S.E.R. 16-17). "Where a plaintiff suspects the truth but investigates unsuccessfully, fraudulent concealment will toll the statute." *UA Local 343* v. *Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1475 (9th Cir. 1994), cert. denied, 116 S. Ct. 297 (1995).

The statute of limitations was then further tolled "during those periods in which the [Commission was required to] follow mandatory notice and conciliation procedures" (App., *infra*, 12a (Fletcher, J., dissenting), citing *Sierra Club* v. *Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987)). The Federal Election Campaign Act contains elaborate administrative procedures—including two levels of formal findings and briefing, an investigation, and mandatory conciliation—that the Commission must satisfy before it may bring a civil enforcement suit. 2 U.S.C. 437g(a). An action filed by the Commission before it exhausts these mandatory procedures would be dismissed as premature. *FEC* v. *National Rifle Ass'n*, 553 F. Supp. 1331, 1337-1339 (D.D.C. 1983). Cf. *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 511-512 (1967) (cause of action does not accrue until "completion of the administrative proceedings contemplated and required" by applicable law because, until those proceedings are completed, the plaintiff has no "right to resort to the courts"). As Judge Fletcher noted, a minimum of 65 days were required for the mandatory administrative procedures to be performed under the Act (App., *infra*, 12a). The action filed by the Commission in this case was therefore timely (*ibid.*).

b. The court of appeals fundamentally misapprehended the statutory powers of the Commission in concluding that, through a "diligent exercise of its investigatory power, [the Commission] could have discovered the operative facts" involved in respondent's fraudulent concealment of the truth (App., *infra*, 8a). Although the Commission is empowered to conduct investigations, 2 U.S.C. 437d(a)(9), it is not authorized to investigate potential violations of the

Act until at least four of its six members determine that there is "reason to believe that a person" has violated the Act. 2 U.S.C. 437g(a)(2). The disclosure reports filed by the Kemp committee in this case provided no information that would have supported such a finding.

Moreover, a vote to find "reason to believe" can take place only "upon receiving a complaint" filed with the Commission or "on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities" (2 U.S.C. 437g(a)(2)). Unlike other government agencies that have broad discretion to gather information and conduct periodic investigations, the "FEC has no such roving statutory functions." *FEC* v. *Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir.), cert. denied, 454 U.S. 897 (1981). In most instances, investigations "may begin only if an individual first files a signed, sworn, notarized complaint with the Commission." *Ibid.* "[M]ere 'official curiosity' will not suffice as the basis for FEC investigations, as it might in others." *Id.* at 387-388.

In view of the limited nature of the disclosures required by the Act and the significant statutory restrictions on the Commission's authority to investigate violations of the Act, the court of appeals seriously erred in concluding that the "reports required by FECA provide sufficient information to FEC that through a duly diligent exercise of its investigatory power, it could have discovered the operative facts giving rise to this suit" (App., *infra*, 8a). Application of the due diligence requirement for tolling the statute of limitations in cases of fraudulent concealment must take account of the particular statutory scheme. See *Klehr* v. *A.O.*

Smith Corp., 117 S. Ct. 1984, 1993 (1997). As Judge Fletcher explained in dissent, the court's holding would improperly "impose[] a duty on the FEC to investigate every report, even though nothing on its face indicates illegal activity" (App., *infra*, 11a). The Commission lacks any such "roving" authority (*FEC* v. *Machinists Non-Partisan Political League*, 655 F.2d at 387), however, and the holding in this case thus provides "a perverse reward" for those "who are most clever in * * * concealing their illegal contributions" (App., *infra*, 12a) (Fletcher, J., dissenting).

The decision of the court of appeals threatens substantially to impair the important enforcement functions that Congress has assigned to the Commission. Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

D.C. No. CV-93-06321 ER
No. 95-55320

FEDERAL ELECTION COMMISSION,
PLAINTIFF-APPELLEE

v.

LARRY R. WILLIAMS,
DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Presiding: EDWARD RAFEEDIE, District Judge

[Argued and Submitted June 5, 1996]
[Decided Dec. 26, 1996]

Before: FLETCHER, BEEZER and KLEINFELD, Circuit Judges.

BEEZER, Circuit Judge:

Larry R. Williams appeals the district court's denial of his motion to dismiss and grant of a motion for summary judgment in favor of the Federal Election Commission (FEC). Williams argues, *inter alia*, that the FEC action is time-barred under 28

U.S.C. § 2462, and that he is not liable for civil penalties under the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431- 455.

The district court had jurisdiction under 28 U.S.C. § 1331. Williams timely filed a notice of appeal. We have jurisdiction under 28 U.S.C. §§ 1291. We hold that 28 U.S.C. § 2462 applies, and we reverse.

I

Jack Kemp sought the 1988 Republican Presidential nomination. At the end of 1987, his campaign committee engaged in a fundraising promotion involving tickets to the Superbowl. The Philadelphia Eagles made a number of tickets available to Kemp's campaign for $100 each. Donors who contributed $1000 to the Kemp campaign were given the right to purchase one of these $100 tickets.

Williams purchased 40 of these tickets from the Philadelphia Eagles for $4000. He then gave those tickets to people whom he persuaded to contribute $1000 to Kemp's campaign, including a number of Williams' friends and employees. In 22 cases, Williams "advanced" $1000 to the contributor as the resale price of the ticket. Williams later resold these tickets and recovered the sums advanced. The fate of the other 18 tickets is not relevant to this case. These events occurred between the autumn of 1987 and the end of January, 1988.

On September 12, 1988, Richard Hooton, a former Williams employee, filed an administrative complaint with FEC. FEC notified Williams, provided a copy of the complaint and offered him an opportunity to respond. On September 13, 1989, FEC found reason to believe that Williams violated 2 U.S.C. §§ 441f and 441a(a)(1)(A).

After an investigation and finding probable cause to believe that Williams had violated FECA. FEC conducted a statutorily mandated attempt at conciliation from May 24, 1993 to July 20, 1993. Conciliation failed.

FEC filed suit on October 19, 1993, seeking the imposition of civil penalties as well as declaratory and injunctive relief. The district court denied Williams' motion to dismiss on limitations grounds and partially granted FEC's motion for summary judgment on January 31, 1995. The district court fixed a $10,000 civil penalty and enjoined Williams from similar violations of FECA for 10 years. After a stipulated dismissal of the remaining count, the court entered final judgment on March 7, 1995. Williams filed a timely notice of appeal.

II

We review de novo a grant of summary judgment. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), *cert. denied*, — U.S. ——, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996).

A

FECA does not contain an explicit statute of limitations for the bringing of actions for civil penalties. Williams argues that the default statute of limitations, 28 U.S.C. § 2462, applies. It provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the

> United States in order that proper service may be made thereon.

Williams argues that this provision applies on its face to FEC suits to impose civil penalties.

FEC argues that § 2462 is not applicable to suits to impose penalties; that by its terms it applies only to suits to *enforce* penalties that have previously been imposed. We disagree.

We have previously held that "enforcement" includes "assessment." *United States v. Walsh*, 8 F.3d 659, 662-63 (9th Cir.1993), *cert. denied*, 511 U.S. 1081, 114 S.Ct. 1830, 128 L.Ed.2d 459 (1994). In Walsh, the government brought an action for civil penalties and injunctive relief under 42 U.S.C. § 7413, the Clean Air Act. The Clean Air Act gives the government the option of issuing administrative penalty orders or bringing a civil action. The government did the latter in *Walsh*. The relevant statutory provision states:

> The Administrator [shall or may, depending on the violator] commence a civil action for a permanent or temporary injunction, or to *assess* and *recover* a civil penalty . . .

42 U.S.C. § 7413(b) (emphasis added). We held in *Walsh*:

> Walsh contends that the action of the United States is an action for money damages brought by the United States and founded on a tort, so that the three-year tort statute of limitations applies, 28 U.S.C. § 2415(b). Walsh is in error. The government's action does not sound in tort but is for

> the enforcement of a civil penalty. The appropriate statute is the five-year statute of limitations. 28 U.S.C. § 2462.

Walsh, 8 F.3d at 662 (emphasis added). It is the law of this circuit that, for the purposes of § 2462, "enforcement" comprises "assessment." *See also 3M Co. (Minnesota Mining and Mfg.) v. Browner*, 17 F.3d 1453 (D.C.Cir.1994) (discussing the drafting history of § 2462 and concluding that "enforcement" comprises "imposition").

Two recent cases from the District of the District of Columbia also hold that actions for civil penalties under FECA are subject to § 2462's limitations period. *FEC v. National Republican Senatorial Committee*, 877 F.Supp. 15 (D.D.C.1995); *FEC v. National Right to Work Committee, Inc.*, 916 F.Supp. 10 (D.D.C.1996). These cases specifically hold that § 2462 applies to FEC actions for the assessment of civil penalties, and that the limitations period begins to run at the time the alleged offense is committed.

We hold that § 2462 applies to FEC actions for the assessment or imposition of civil penalties under FECA.

B

FEC argues that § 2462 does not apply to actions for injunctive relief. This assertion runs directly contrary to the Supreme Court's holding in *Cope v. Anderson*, 331 U.S. 461, 464, 67 S.Ct. 1340, 1341, 91 L.Ed. 1602 (1947). *Cope* holds that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." In other words, because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both.

C

FEC next argues that the running of the statute of limitations was tolled during the time that Williams allegedly fraudulently concealed his illegal payments. FEC cites *In re United Insurance Management, Inc.*, 14 F.3d 1380, 1384 (9th Cir.1994). FEC also argues that the related "discovery rule" applies, citing *No. Calif. Retail Clerks Unions v. Jumbo Markets, Inc.*, 906 F.2d 1371, 1372 (9th Cir.1990). Neither of these cases involves § 2462's limitations period.

In *3M Co.*, 17 F.3d at 1460-1463, the D.C. Circuit specifically rejected the application of the discovery rule to the running of limitations periods under § 2462. *3M Co.* states:

> [W]e hold that an action, suit or proceeding to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty. We reject the discovery of violation rule [respondent] advocates as unworkable; outside the language of the statute; inconsistent with judicial interpretations of § 2462; unsupported by the discovery of injury rule adopted in non-enforcement, remedial cases; and incompatible with the functions served by a statute of limitations in penalty cases.

17 F.3d at 1462-1463. We agree.

3M Co. is silent on the application of the doctrine of equitable tolling for fraudulent concealment. The doctrine of equitable tolling provides that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. . . ."

Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946) (internal quotations omitted). "This equitable doctrine is read into every federal statute of limitation." *Id*. We have found only two cases that have addressed the application of equitable tolling to § 2462's limitations period. *United States v. Core Laboratories, Inc.*, 759 F.2d 480, 484 (5th Cir.1985); *United States v. Firestone Tire & Rubber Co.*, 518 F.Supp. 1021, 1036 (N.D.Ohio 1981). Both cases applied equitable tolling to s 2462's limitations period. We are compelled by *Holmberg* to agree; section 2462 is subject to equitable tolling.

To establish that equitable tolling applies, a plaintiff must prove the following elements: fraudulent conduct by the defendant resulting in concealment of the operative facts, failure of the plaintiff to discover the operative facts that are the basis of its cause of action within the limitations period, and due diligence by the plaintiff until discovery of those facts. *See, e.g., King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir.1981), *cert. denied*, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975).

These elements are not met in this case. FECA's campaign finance reporting requirements are, as a matter of law, sufficient to give FEC "notice of facts that, if investigated, would indicate the elements of a cause of action." Calvin W. Corman, *Limitation of Actions* § 9.7.1 (1991) (citing *United Klans of America v. McGovern*, 621 F.2d 152 (5th Cir.1980); *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir.1980)).

FECA specifies that a political committee must file reports that disclose "the identification of each . . . person . . . who makes a contribution . . . in excess

of $200." 2 U.S.C. § 434(b)(3). The term "identification" means "in the case of any individual, the name, mailing address, and the occupation of such individual, as well as the name of his or her employer." 2 U.S.C. § 431(13)(A). The 22 contributions in this case came from employees and friends of Williams. There is no allegation that the 22 contributions by Williams' employees and friends were not listed in the campaign reports, or otherwise contained false information. FEC is specifically empowered to conduct investigations expeditiously, 2 U.S.C. § 437d(a)(9). The reports required by FECA provide sufficient information to FEC that through a duly diligent exercise of its investigatory power, it could have discovered the operative facts giving rise to this suit.

Neither the discovery rule nor equitable tolling for fraudulent concealment tolls the running of the limitations period in this case.

D

Finally, FEC argues that the pendency of administrative proceedings tolled the statute of limitations for the duration of the administrative proceedings, citing *Sierra Club v. Chevron, U.S.A., Inc.*, 834 F.2d 1517, 1523 (9th Cir.1987). Because it makes no difference to our conclusion in this case, we do not address the application of Sierra Club.

Aggregating all of FECA's mandatory time periods for notice (35 days total) and conciliation (30-90 days), *see* 2 U.S.C. § 437g(a), and tolling the running of the statute of limitations for all these time periods, FEC's action would still not be timely. The limitations period commenced at the latest on January 31, 1988, and the five-year period expired on January 31, 1993. The maximum 125 days of statutorily mandated

time for notice and conciliation in FECA would not render timely FEC's action, which was filed on October 19, 1993. We make no holding as to whether any of these FECA-mandated time periods fall within the rationale of *Sierra Club*.

III

Because we conclude that FEC's suit was untimely and should have been dismissed, we do not address the remaining issues raised by the parties.

REVERSED.

FLETCHER, Circuit Judge, dissenting:

The majority correctly determines that the equitable tolling doctrine applies to 28 U.S.C. § 2462. However, I cannot agree with the majority's conclusion that the doctrine does not apply to toll the running of the statute in this case.

To support its conclusion that the statute of limitations began to run as soon as the violation occurred, the majority relies on *3M Co. v. Browner*, 17 F.3d 1453 (D.C.Cir.1994), a decision that is neither the law of our circuit nor directly on point, nor does it deal with the statute involved in this case. In *3M Co.*, the D.C. Circuit held that a plaintiff's failure to discover a violation of the law in question should not toll the statute of limitations. 17 F.3d at 1463. But in holding that the discovery rule should not apply to § 2462, the *3M Co.* court had no occasion to consider the "venerable principle" of equitable tolling. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360-62, 111 S.Ct. 2773, 2781, 115 L.Ed.2d 321 (1991). *3M Co.* simply does not address the situation we face here, in which the very nature of the offense at issue—making a political contribution in the name of another person in order to exceed the $1,000 limit

on contributions—involves using deceptive methods to conceal violations of the campaign-finance laws. It seems only logical that the discovery rule apply when the defendant's deception in the course of committing a violation prevents discovery of that violation.

Equitable tolling prevents a defendant from fraudulently depriving a plaintiff of the opportunity to bring a cause of action due to the running of the statute of limitations. "[W]here a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' "*Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1874)). Equitable tolling is proper in this case: "without any fault or want of diligence or care", the FEC did not discover Williams's fraud until the complaint against him was made to the FEC in September 1988. The running of the statute should be tolled at least until that time.

Equitable tolling requires both that the defendant engage in fraudulent conduct resulting in concealment of the operative facts giving rise to the violation and that the plaintiff fail to discover the violation within the limitations period despite due diligence. *See King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir.1981), *cert. denied*, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982); *see also In re United Ins. Management, Inc.*, 14 F.3d 1380, 1385 (9th Cir.1994) (discussing plaintiff's duty to diligently investigate potential cause of

action). The majority states that the FEC "should have discovered the operative facts giving rise to this suit" merely because the names of the 22 persons in whose names Williams made contributions were listed in the campaign reports. Yet nothing before us indicates that the FEC had any reason to suspect Williams's involvement in those contributions until it received Richard Hooton's complaint. The majority in effect imposes a duty on the FEC to investigate every report, even though nothing on its face indicates illegal activity, or else risk being barred by the statute of limitations when a violation comes to light. Here, the very information contained in the report was used to lull the FEC into believing that no single contributor gave more than the $1,000 limit. I conclude that the earliest date on which the statute of limitations could have commenced running in this case was September 12, 1988, the date of Hooton's complaint.

Moreover, upon receiving Hooton's complaint, the FEC promptly notified Williams and began investigating whether Williams had in fact violated FECA. The FEC did not find reason to believe that Williams had violated FECA until September 13, 1989, and did not find probable cause to support its suspicions until some time later. There is no indication that the FEC was less than diligent in investigating Williams' alleged violations.

This court faced a similar situation in *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465 (9th Cir.1994), *cert. denied*, — U.S. ——, 116 S.Ct. 297, 133 L.Ed.2d 203 (1995). There, the National Labor Relations Board failed to file suit against the defendant within California's four-year statute of limitations for breach of contract. The NLRB argued that the

statute was equitably tolled because even though it had reason to suspect the defendant of illegal conduct as early as 1980 and repeatedly sought information from him, it did not have sufficient evidence to support a complaint until the limitations period had run. *See id.* at 1474-75. The court agreed: "Where a plaintiff suspects the truth but investigates unsuccessfully, fraudulent concealment will toll the statute." *Id.* at 1475.

The majority's refusal to apply equitable tolling here raises distressing policy concerns. If the statute of limitations is not equitably tolled in penalty proceedings involving the kind of violation that was committed in this case, the result will be a perverse reward for violators of the campaign-finance laws: those who are most clever in deceiving the FEC and concealing their illegal contributions will be the least likely to be prosecuted successfully, since their violations will take the longest time to come to light.

Finally, I disagree with the majority's refusal to apply the principles of *Sierra Club v. Chevron, U.S.A., Inc.*, 834 F.2d 1517 (9th Cir.1987), in determining the timeliness of the FEC's action. The FEC received Hooton's administrative complaint on September 12, 1988, and filed suit on October 19, 1993. Running the five-year statute of limitations from the filing of Hooton's complaint with the FEC puts the FEC's filing of the suit 37 days after the running of the statute. Application of *Sierra Club*, however, would toll the statute during those periods in which the agency must follow mandatory notice and conciliation procedures. FECA provides a range of 65-125 days for such procedures. The FEC was involved in conciliation efforts with Williams from May 24, 1993, to July 20, 1993. Thus, *Sierra Club* strongly sug-

gests that the complaint was timely even without applying equitable tolling.

Furthermore, the rationale of *Sierra Club* highlights the inappropriateness of reliance on *3M Co.* Because the FEC must follow statutorily mandated administrative procedures before it may bring a civil action, running the statute of limitations from the date of the violation would gravely limit the FEC's ability to fulfill its statutory mandate. Applying the *3M Co.* "date of the violation" rule to this case contravenes both the language and the legislative history of FECA. The Act's enforcement provisions are tied to the receipt of an administrative complaint. They require that the FEC, after receiving an administrative complaint, notify the alleged violator and provide him or her with opportunity to respond. 2 U.S.C. § 437g(a)(1). Only after determining that it has reason to believe that the person named in the complaint has violated the Act may the FEC undertake a full investigation of the alleged violation. *Id.* § 437g(a)(2). If it finds probable cause to believe that the person violated the Act, the FEC must engage in conciliation efforts. *Id.* § 437g(a)(4)(A). T he FEC may initiate a civil action against the alleged violator only after conciliation efforts have failed. *Id.* § 437g(a)(5)(D).

Congress adopted the notice and conciliation requirements of § 437g in order to encourage informal resolution of apparent FECA violations. Congress intended the FEC to bring civil actions only "where its informal methods of obtaining compliance fail to correct violations." *Joint Explanatory Statement*, Conf. Rep. No. 1237, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5618, 5662. The statute of limitations should be tolled while the FEC fulfills

its statutory obligation to resolve informally an alleged FECA violation.

I would affirm the District Court's grant of summary judgment to the FEC. I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 93-6321-ER (BX)

FEDERAL ELECTION COMMISSION,
PLAINTIFF

v.

LARRY R. WILLIAMS,
DEFENDANT

ORDER RE: CROSS-MOTIONS
FOR SUMMARY JUDGEMENT

[Filed: Jan. 31, 1995]

The parties cross-Motions for Summary Judgement came before the Honorable Edward Rafeedie on January 26, 1995. The parties stipulated to waive oral argument on these motions, which Stipulation was approved by the Court.

The Court, having considered the Motions, the opposing and reply papers, and all other matters presented to the Court, HEREBY ORDERS, as follows:

1. The Defendants's Motion for Summary Judgement is DENIED and the Plaintiff's Motion for Summary Judgement is GRANTED, for the reasons stated below:

a) The Court does not believe the presence of *ex officio* members on the Commission makes the Commission's actions constitutionally infirm under the separation of power doctrine. Under the reasoning of *Buckley v. Valeo*, 96 S. Ct. 612 (1976), the 2 *ex officio* members do not hold an "Office Under the United States" and therefore there is no violation of Art. I, § 6, cl. 2 of the Constitution—which prohibits members of either the House or the Senate from holding such an Office. Moreover, the Court believes that the presence of those members on the Commission does not violate separation of powers principles, because they were entrusted with an advisory role—and could not vote on Commission action. Although the Court is cognizant of the D.C. Circuit's decision in *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed* (Dec. 1994), the Ninth Circuit's decision in *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1977) compels a different result. Because the *ex officio* members do not vote, it does not appear Congress sought to usurp an executive function. Thus, the focus of the separation of powers inquiry must shift to whether their presence on the Commission "impermissibly undermines" the executive branch's role. *Commodities Futures Trading Commission v. Schor*, 106 S. Ct. 3245, 3261 (1986). Quite simply, it does not appear that this is the case.

b) Further, even if it were, the *de facto* authority doctrine would permit the Commission's acts to stand. The Supreme Court implemented this doctrine with respect to an earlier version of the

Act in *Buckley*, and there appears to be no reason to depart from its reasoning. As a result, even if the Commission's actions were constitutionally defective, the *de facto* doctrine would permit them to stand.

c) The Court does not believe that the Act's provisions are unconstitutionally vague. The Court believes that the statutory provisions are not so vague that "the ordinary person exercising ordinary person common sense [could not] sufficiently understand and comply with" them. *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of letter Carriers*, 413 U.S. 548 (1978).

d) Nor does the Court find merit in Defendant's position that because the Commission did not seek an estimation of its claims in Bankruptcy Court, it has waived its right to enforce a civil penalty or is estopped from doing so. There seems to be no dispute that the penalties would be would be non-dischargeable in Defendant's bankruptcy. Thus, this situation seems analogous to *In re Hanna* 872 F.2d 829 (8th Cir. 1988), in which the Eighth Circuit held that postpetition interest on a non-dischargeable tax debt was collectible, despite the failure to have the amount estimated by the bankruptcy court.

e) Finally, the Court is not persuaded that Defendant has suffered prejudice as a result of an excessive delay in the prosecution of this action.

f) With respect to the issue of whether Defendant's conduct violated the Act, the underlying facts are not disputed: Defendant purchased 40

Super Bowl tickets, for $100 each or a total of $4,000, from the Philadelphia Eagles and made them available to a campaign committee for Jack Kemp's 1988 presidential campaign. The tickets were to be used as part of a promotion to obtain contributions: in return for a $1000 contribution, a contributor would receive a free ticket.

Similarly, there is no dispute that Defendant either advanced or reimbursed $1,000 to 22 individuals who made $1,000 contributions to the Kemp campaign.

Finally, there appears to be no dispute that Defendant contributed $1,694 on his own behalf to the Kemp campaign.

g) The Act prohibits both making contributions in another person's name and individual contributions in excess of $1,000. 2 U.S.C. §§ 441a(a)(1)(A), 441f. It appears clear to the Court that Defendant's conduct in either advancing or reimbursing the $1,000 to the 22 individuals violates the prohibition of making contributions—including loans, advances or gifts for the purpose of influencing an election—in another person's name. This constitutes a violation of 2 U.S.C. § 441f, in that Defendant made 22 contributions totalling $22,000 in the names of others to the Jack Kemp for President Committee and Victory '88.

Similarly, by virtue of the fact his total contributions-through his own and others' names—total $27, 694,[1] it is clear that Defendant contributed $26,694 in excess of the statutory limit of $1,000.

Further, there is no doubt Defendant knew of the Act's prohibitions. This is sufficient to establish willfulness under the Act, because a defendant's belief that he did not violate the Act is not a defense. Defendant's citation to *Cheek v. United States*, 498 U.S. 192 (1991) is inapposite because that case dealt with *criminal* penalties for tax evasion. More to the point is *Davis v. United States*, 961 F.2d 867, 871 (9th Cir. 1992), which held that in a civil context, wilfulness is a voluntary, conscious and intentional act and that bad faith need not be proven.

2. Accordingly, the Court believes civil penalties under 2 U.S.C. § 437g(a)(6)(C) should be imposed in the amount of $10,000.00. In addition, the Court enjoins Defendant from similar violations of the Act for

---

[1] Defendant Williams apparently does not dispute the fact that he made actual and in-kind contributions totalling $5,694 (the $4,000 for the tickets, plus $1,694 of other contributions); added to the $22,000, his total contributions were $27,694.

The Court notes that even if the $1,000 advances/ reimbursements to the 22 individuals did not constitute a violation of 2 U.S.C. § 441f, the $22,000 would still be included with respect to the excess contributions made in Defendant's own name. If the transactions were viewed as re-sales—i.e., that Defendant's purchased a ticket worth $1,000 from each individual—Defendant's contribution of the tickets to the campaign committees should be valued at fair market value, which based on the re-sale to Defendant, would be a least $1,000.

a period of 10 years form the date of this Order, based on Defendant's continuing belief he committed no wrong-doing.

IT IS SO ORDERED

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: January 31, 1995

/s/ EDWARD RAFEEDIE
EDWARD RAFEEDIE
United States District
Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 93-6321-ER (BX)

FEDERAL ELECTION COMMISSION,
PLAINTIFF

v.

LARRY R. WILLIAMS,
DEFENDANT

ORDER RE: MAY 17, 1994
RULING ON MOTION TO DISMISS

[Filed: Oct. 27, 1994]

Plaintiff Federal Election Commission's (the "Commission") motion to clarify came before the Honorable Edward Rafeedie on October 24, 1994.

The Court, having considered the moving papers and all other matters presented to the Court, HEREBY ORDERS, as follows:

1. That Plaintiff's motion to clarify is GRANTED; and

2. That, as ordered by the Court on May 17, 1994, "*unless [the parties] receive[d] a written order to the contrary*," the Court stood by its tentative ruling to DENY the defendant's motion for the reasons stated in open court.

IT IS SO ORDERED

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: October 27, 1994

/s/ EDWARD RAFEEDIE
EDWARD RAFEEDIE

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 93-6321-ER

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

LARRY R. WILLIAMS, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HONORABLE EDWARD RAFEEDIE,
JUDGE PRESIDING

[1]

APPEARANCES:

For the Plaintiff: FRANIA MONARSKI
Federal Election Office
of General Counsel
999 E Street, N.W.
Washington, D.C. 20463

For the Defendant: W. JAMES KNOWLES
790 West 3000 South
Heber City, Utah 84032

Official Court Reporter: MARY TUCKER,
CSR 9308
429-D U.S. Courthouse
312 North Spring Street
Los Angeles, Calif. 90012
213/687-0530 [2]

[3]

LOS ANGELES, CALIFORNIA; TUESDAY,
MAY 17, 1994
(10:00 A.M.)

THE CLERK: Civil 93-6321, Federal Election Commission v. Larry R. Williams.

Counsel, please state your names for the record.

MS. MONARSKI: Good morning, your Honor. Frania Monarski representing the Federal Election Commission.

MR. KNOWLES: Good morning, sir. I am James Knowles representing Larry Williams.

THE COURT: Yes.

This is a motion by the defendant to dismiss this action brought by the Federal Election Commission on the grounds that the statute of limitations has run.

The court has read and considered all of the papers that have been submitted in this matter, and tentatively conclude as follows: The defendant asserts that this suit is time-barred by the statute of limitations and 28 United States Code, section 2462. But the court finds that that section is not applicable to civil suits brought by the FEC under section 437(G) of the Federal Election and Campaign Act.

The FECA contains no time limit for civil actions, instead adopting procedural requirements before a civil action may be brought. The existence of a three-year time limit for criminal action suggests that this omission was [4] not a mistake or an oversight, but that congress intended no time limit on FECA civil actions.

In making this determination, the court relies on the case of *Occidental Life Insurance v. EEOC*, from the Supreme Court in 1977. In that case, although it

dealt with analyzing the Equal Opportunity Act, the Supreme Court has held that there is not time limit on the EEOC suits that are brought under title vii.

Like the EEOC, the FECA requires that if the commission does find probable cause to believe the charges, it must attempt to resolve the matter through informal method of conference or conciliation, 2 United States Code, section 437(G)(A), 4(A)1. Only if these informal methods fail can the commission bring suit in a Federal District Court.

The administrative requirements of notice and informal resolution supply adequate protection to the defendant. Accordingly, the absence of the statute of limitations in the FECA should be interpreted as an intention to put no time limits on the FEC's ability [5] to bring suit in a district court. And the catchall statute of limitations of 2462 does not apply.

In this case, a defendant has been given all the notice required by the FECA and he has not alleged any prejudice from the delay by the FEC. Therefore, the FEC suit is not barred by the statute of limitations and the court would deny the motion to dismiss.

MR. KNOWLES: Your Honor, you indicated a tentative conclusion. Does that mean I may respond?

THE COURT: You may.

MR. KNOWLES: Thank you, your Honor.

I would like to call the court's attention to the great divergence of fact and law applicable in the *Occidental* case, the EEOC matter.

First of all, that type of a case, sir, is a case involving the vindication of a personal right, not a sovereign right. That's the first difference.

In our case, it is the FEC attempting to vindicate what it conceives to be a violation of the sovereign

position of the government relative to what they call corrupt election campaign activities.

The second very significant difference is this,

Sir: In the *Occidental* EEOC case you do not an enforcement proceeding. You have a damage proceeding to vindicate that individual. It would never had fallen under [6] 28 section 2462 for that very simple reason. It's not the type of case which would fall in there.

Incidentally, your Honor, I should point out, that in the *Occidental* case, even if the statute did apply, if I recall my case correctly, it was brought well within the five-year period from the event complained of.

The *Occidental* case is different in all area from the case before the court today. The reference to prejudice, you honor, I cited the *Baldwin* case in my reply brief, which pointed out that absence of prejudice is merely a factor to be considered in a tolling situation, when you have a tolling situation. When the tolling situation otherwise appears to decide whether you will toll. We do not have a tolling situation.

The mere fact that the Federal Election, the Act, made references to a criminal penalty would not abrogate the application of the enforcement statute.

THE COURT: You are asking us to read into a statute of limitations where congress did not include one. Why would we do that?

MR. KNOWLES: Because of the language of the statute itself, your Honor. The language which I quoted verbatim in my original motion, clearly states—it starts out "except as otherwise provided by act of congress," "except as otherwise provided." Those are the very first [7] words of the statute under which I have brought this motion.

The reply that I have submitted to your Honor indicated that there is no otherwise provided by act of congress. Therefore, by its expressed language, this statute applies, because this is an action or a suit for the enforcement of a civil fine. It couldn't be more clearly stated.

THE COURT: It is not an action or suit for enforcement of a civil claim.

MR. KNOWLES: No. It is an action for a civil fine, penalty, or forfeiture. That is what this action today is. That is the very language of the statute of limitations which I read to your Honor. It says that is the five-year application which we are seeking.

I am not at a loss to imagine where it would apply otherwise except in that. The very first point that counsel for the FEC raises: well, this isn't really an action, this is just an assessment. Well, your Honor, the act —

THE COURT: What is the relief that's sought?

MR. KNOWLES: The relief that is sought is the relief that is authorized by the Federal Election Act. It's the relief to have an order for a civil penalty. There is nothing in there that authorizes the court to [8] access a civil penalty, which is the way the prayer is worded. The language is to order a civil penalty. Nothing could be more specifically applicable as I read the plain language of both the federal election code provisions and this statue. This is a civil penalty action. This is a request for an order to impose a civil penalty.

THE COURT: Isn't that what the other case, the EEOC case was?

MR. KNOWLES: No, sir.

THE COURT: That was the agency suing, not the individual.

MR. KNOWLES: The agency was bringing that action to vindicate the right of the individual and was not seeking a penalty. It was a damage action, sir. It would never fall under this statue.

I submit, sir, that because of that great difference, the individual right versus the sovereign right, and the penalty versus the damage, that is not applicable to this type of an action, and it falls squarely under that. I respectfully submit that that is the appropriate view.

THE COURT: Why shouldn't you be held to the statute? Why didn't you file it sooner than you did?

MS. MONARSKI: Well, your Honor, I think the EEOC case does apply here because the same analysis apples. [9] The purpose of the statute of limitations is to assure fairness to the defendant and make sure that he has notice of the charges.

THE COURT: Well, the purpose of the statute of limitations to is avoid state claims.

MS. MONARSKI: Yes, your Honor.

THE COURT: That's the basic purpose. This is a state claim. This conduct occurred in 1988.

MS. MONARSKI: Yes, your Honor. But we didn't know about it until the complaint was filed with us and then the commission—

THE COURT: When was that?

MS. MONARSKI: The complaint was filed in September of '88, and in September of '88 —

THE COURT: Well, even that's over five years.

MS. MONARSKI: Yes, your Honor, but the commission initially had to make a decision whether to investigate the complaint.

THE COURT: You brought it to the attention of the defendant.

MS. MONARSKI: Yes. In September of 1988, your Honor, we brought it to the attention of the defendant. We notified him and we also provided him with a copy of the complaint and an opportunity to respond to the complaint.

THE COURT: What happened after that?

[10]

MS. MONARSKI: Then the commission looked at the information. And in September of 1989 found reason to believe that a violation had occurred and instituted an investigation.

THE COURT: And when was that culminated?

MS. MONARSKI: That was culminated in March of 1993.

THE COURT: Was there any effort to resolve this with the defendant.

MS. MONARSKI: Yes, your Honor.

In March of 1993, the general counsel of the commission notified the defendant that he was going to recommend probable cause to believe that the defendant violated the Federal Election Campaign Act. Provided the defendant with a copy of a brief on a legal and factual analysis of the case and provided the defendant with an opportunity to respond.

After that time, the general counsel—after the defendant responded, the general counsel submitted a report to the commission; and on May 18, the commission found probable cause to believe —

THE COURT: May 18 of what year?

MS. MONARSKI: 1993.

THE COURT: 1993?

MS. MONARSKI: Yes.

[11]

THE COURT: When was the report submitted?

MS. MONARSKI: Sometime between March '93 and May of 1993.

The Commission's investigation occurred between when it made it's reason to believe findings in September of 1989 through 1993.

THE COURT: It took four years to investigate this claim?

MS. MONARSKI: Yes, your Honor.

It involved a reimbursement scheme. It involved 22 other individuals.

THE COURT: I understand what it involved.

Well, the Court is going to stand by its tentative ruling unless you receive written order to the contrary. I will reconsider the matter.

MS. MONARSKI: Your Honor, will we get a copy of your tentative ruling?

THE COURT: Yes.

MS. MONARSKI: There is one more administrative question, your Honor. We filed a status report in April of—just recently. And we were not in touch with the defendant and at that point. He has now submitted a joint status report to us. But you have already filed an order setting a discovery schedule. And I wanted to know whether we still need to file a joint status report.

[12]

THE COURT: If the order scheduling the case has already been filed, there is no need to.

MR. KNOWLES: I prepared and sent to counsel a form of joint status report after I heard from her secretary indicating that was preferred over the unilateral ex parte report, your Honor.

THE COURT: Yes. Okay. Well, that's fine.

MR. KNOWLES: Your Honor, this matter is a dispositive matter.

THE COURT: If the matter is dismissed you can forget about the rest of it.

MR. KNOWLES: Yes, your Honor.

THE COURT: You will know very shortly.

MR. KNOWLES: Thank you, your Honor. I appreciate it.

MS. MONARSKI: I just have one more question, your Honor. Can the Commission begin it's discovery prior to receiving—

THE COURT: I would suggest that you not do so. You are going to receive it very soon.

MS. MONARSKI: Thank you very much, your Honor.

MR. KNOWLES: Thank you, your Honor.

(Proceedings adjourned.)

[13]

* * * * * *

I, Mary Tucker, CSR, do hereby certify that the foregoing transcript is true and correct.

/s/ MARY TUCKER 11-17-94
MARY TUCKER, CSR DATE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 93-6321-ER(BX)

FEDERAL ELECTION COMMISSION

v.

LARRY R. WILLIAMS

[May 17, 1994]

CIVIL MINUTES - GENERAL

MOTION DEFENDANT FOR
DISMISSAL OF ACTION

HONORABLE EDWARD RAFEEDIE

JUDY MATTHEWS	MARY TUCKER
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Frania Monarski

ATTORNEYS PRESENT FOR DEFENDANTS:
W. James Knowles

The Court having read and considered all pleadings submitted and having heard statement of counsel, motion defendant for dismissal of action is denied.

Initials of Deputy Clerk__

Minutes Form 11
Civil - Gen

Supreme Court, U.S.
FILED
NOV 3 1997
CLERK

No. 97-601

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

Federal Election Commission,

Petitioner,

v.

Larry R. Williams,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stuart M. Gerson
Counsel of Record
Epstein Becker & Green, P.C.
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Washington, D.C. 20037
(202) 861-0900
Counsel for Respondent

November 5, 1997

1688

QUESTIONS PRESENTED

1. Whether the court of appeals appropriately held that when it applied the statutory bar against legal relief contained in 28 U.S.C. § 2462, it also foreclosed equitable relief, especially in view of the fact that petitioner, the Federal Election Commission, admitted to the court that it could not present evidence of any ongoing or imminent violation of the law by appellant as to which injunctive relief might properly be ordered.

2. Whether the court of appeals properly held that the statute of limitations should not be tolled because materials from which a case against respondent could have been prepared were in the hands of the Federal Election Commission throughout the statutory limitations period and so respondent could not have engaged in fraudulent concealment.

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II. The Court of Appeals Properly Held That The Statute Of Limitations, 28 U.S.C. § 2462, Should Not Be Tolled Because Materials From Which a Case Against Respondent Could Have Been Prepared Were in the hands of Petitioner, the Federal Election Commission Throughout the Statutory Limitations Period, and Petitioner Could not Make out a Case Of Fraudulent Concealment 6

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IN THE
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OCTOBER TERM, 1996

Federal Election Commission,

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Larry R. Williams,

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On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Introduction

The respondent, Larry R. Williams, respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Petitioner's argument that the court of appeals' here-uncontested barring of the action at law under the statute of limitations described in 28 U.S.C. § 2462 should not be held to bar equitable relief against future violations of the law is a moot point given petitioner's concession before the court of appeals that it had no reason to conclude that respondent was about to violate the federal election law or would violate the law

in the future. The decision of the court of appeals is easily harmonized with governing authority of this Court and furnishes no appropriate basis for review here.

As to petitioner's argument that the statute of limitations should be tolled, there is no arguable split of authority in the circuits on the point and no important question of law presented here. Petitioner's interpretation of law, properly rejected by the court of appeals, would, contrary to statutory language, lead to the illogical result of turning any matter subject to the agency's investigatory powers into one of "fraudulent concealment." This would amount to the constructive cancellation of the statute of limitations, an entirely anomalous result.

Procedural History

In its December 26, 1996 decision, a panel of the United States Court of Appeals for the Ninth Circuit, following both its own precedent generally, and a series of cases in the D.C. Circuit specifically addressing the conduct of petitioner (also referred to herein as the Federal Election Commission or FEC), held that: 1) the five-year general federal default statute of limitations, 28 U.S.C. § 2462, applied to FEC actions for civil penalties under the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-55; 2) while 28 U.S.C. § 2462 is subject to equitable tolling, the FEC could not obtain the benefit of that doctrine in this case because information concerning the allegedly unlawful campaign contributions at issue was in the FEC's possession throughout the statute of limitations period; and 3) under the rule of *Cope v. Anderson*, 331 U.S. 461, 464, (1947), § 2462 precluded injunctive relief in this case because "the claim for injunctive relief is connected to the claim for legal relief." *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996).

Given the dissent of one of the appeals court panel members on the equitable tolling point ultimately raised here (but not on the statute of limitations or injunction points), the FEC petitioned the court for rehearing and suggested that the matter be reheard *en banc*. The FEC did not, however, seek rehearing of the fundamental holding of the panel that § 2462's statutory bar governs actions under the federal election laws. On June 5, 1997, the court of appeals denied rehearing.

Factual Background

The material facts are set forth in the opinion of the court of appeals at 104 F.3d at 239. According to the FEC, in late 1987, respondent purchased 40 Super Bowl tickets from the Philadelphia Eagles for $4,000. These were supposed to have been used in a promotion which would have made one ticket available to contributors who had given $1,000 to a particular presidential candidate's campaign committee. Respondent was alleged to have advanced the $1,000 price to 22 contributors who were friends of his, and then resold the tickets to recover his money. The contributions, thus, were attributed to him by the FEC, and their sum far exceeded what he lawfully could have donated to a given campaign.

After conciliation failed, the FEC brought suit in district court, which granted summary judgment to the FEC, assessing a $10,000 penalty and a 10-year injunction against respondent as to similar misconduct. The FEC had made no showing concerning either any continuation of alleged past misconduct by respondent or of any likelihood of anticipated future misconduct by him. The only factual allegations made concerned the alleged scheme regarding the football tickets. When the injunctive point was argued before the court of appeals, FEC counsel again was not able to make any such showing, though he was asked specifically if the agency had any such evidence.

Petitioner's argument concerning the unavailability of equitable relief under *Cope*, though it has a surface plausibility, fails in the end because it is no more than a straw man that bears no resemblance to the case at bar, where the equitable remedy sought was in fact coextensive with the legal remedy denied by virtue of the statute of limitations.

In cases where an enforcement agency such as the FEC can show continuing misconduct, or a substantial likelihood of present misconduct, it could, under its governing statute, obtain injunctive relief, notwithstanding the unavailability of fines or damages. In the instant case, however, the FEC made no showing of any likelihood of recurrence of misconduct, and sought no more than an automatic injunction. That sort of remedy is just what *Cope* precludes and the petition, therefore, should be denied.

Petitioner's argument concerning equitable tolling lacks even surface plausibility. Never having presented any evidence that respondent had ever engaged in any affirmative act of fraudulent concealment -- only that he had violated the law by making improper campaign contributions through an alleged scam involving Super Bowl football tickets -- the FEC's current argument would turn virtually any election-law case into a fraudulent concealment case, activating equitable tolling and effectively cancelling the statute of limitations. The court of appeal's decision to the contrary was eminently reasonable, and petitioner cannot describe a split of authority in the circuits or an important question of federal law in this regard.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS APPROPRIATELY HELD THAT, IN THIS CASE, THE STATUTORY BAR AGAINST LEGAL RELIEF, 28 U.S.C. § 2462 (THE APPLICABILITY OF WHICH IS NOT AT ISSUE HERE) ALSO FORECLOSED EQUITABLE RELIEF BECAUSE PETITIONER ADMITTED TO THE COURT THAT IT COULD PRESENT NO EVIDENCE OF ANY ONGOING OR IMMINENT VIOLATION OF THE LAW BY RESPONDENT AS TO WHICH INJUNCTIVE RELIEF PROPERLY MIGHT HAVE BEEN ORDERED.

Petitioner's argument concerning equitable relief would appear, on the face of things, to raise an important question. Upon close analysis, however, the argument should be seen to present no more than a hypothetical concern of no relevance to the instant case and raising no real threat to the government's authority to seek and to obtain injunctive relief, even in cases where remedies at law are otherwise unavailable.

In this case, the panel noted:

> FEC argues that § 2462 does not apply to actions for injunctive relief. This assertion runs directly contrary to the Supreme Court's holding in *Cope v. Anderson*. *Cope* holds that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." In other words, because the claim for injunctive relief is

> connected to the claim for legal relief, the statute of limitations applies to both.

104 F.3d at 240.

On the facts presented, this ruling is not only correct, but it also does not jeopardize appropriate action on the part of regulatory agencies such as the FEC either. Indeed, it is noteworthy that in the nearly one year since the opinion in this case was published, the FEC cannot point to a single case in which this holding has been raised as a potential barrier to its (or any other enforcement agency's) obtaining injunctive relief independent of penalties at law. The reason for the unlikelihood of such an event is not obscure.

No matter how *Cope* is read, and petitioner accurately cites the fact that several circuits have interpreted the case differently, nothing in *Cope* pretermits the basic requirements for the award of injunctive relief, and the FEC admittedly cannot satisfy them.

Stated differently, the FEC constructively argues here that it should be entitled to injunctive relief merely because, in its view, the Ninth Circuit has applied *Cope* too broadly. At the same time the FEC has conceded that it cannot set forth any reason for a court to grant injunctive relief other than that respondent has committed a "violation" of the campaign contribution law which the FEC now concedes that it may not prove because it is barred by the statute of limitations.

Though challenged on the issue, the FEC offered no assertion that the respondent had continued to violate the law or that he was likely to violate the law -- grounds, as we shall show, that might support injunctive relief even absent legal relief. Thus, to the FEC, an injunction is somehow an automatic response to a mere finding that a party has violated

the law. This view makes legal and injunctive relief -- at least in this case -- part and parcel of the same thing and, logically and legally, subject to the rule of *Cope*, as the court of appeals properly held.

Petitioner's argument implies that equity was unconcerned with statutes of limitations. Such a suggestion would have been erroneous before law and equity were merged in the federal courts; it is even less tenable afterwards. Where there is no statute of limitations applicable to suits, equity fashions its own time limitations through the doctrine of laches. *International Tel. and Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 926 (9th Cir. 1975) *rejected on other grounds California v. American Stores Co.*, 495 U.S. 271, 283 (1990). Under this doctrine, prejudice to the defendant accrues as a rebuttable presumption by virtue of the bare fact of delay. *Id.* (citing *Russell v. Todd*, 309 U.S. 280 (1940)), the principal case upon which the Supreme Court relied in *Cope*.

Although analogous statutes of limitations do not automatically control the application of laches, equity generally will look to the statute of limitations relating to actions at law of like character and usually acts in conformity with it. *See International Tel.*, 518 F.2d at 926.

Petitioner's citations of text and case authorities predating the merger of law and equity are thus as inapplicable as they are unexceptionable. The hypothetical case that petitioner is worried about is very different from the case at bar, and the FEC's position in such a case should be unaffected by the denial of the petition here.

Under the standard for obtaining injunctive relief by which the FEC and many other enforcement agencies operate, an injunction may issue upon a showing that a person is likely to commit future violations of the pertinent federal laws. In turn, a demonstration of a likely future violation is predicated on proving that person's past violations of the law and, among other things, the likelihood of recurrent misconduct.

This standard was well established within the Ninth Circuit when it decided the case. *Compare SEC v. Fehn*, 97 F.3d 1276, 1295 (9th Cir. 1996) with *FEC v. Furgatch*, 869 F.2d 1256, 1262 (9th Cir. 1989). The *Furgatch* and the *Fehn* courts both relied upon *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980) as the case by which this standard is defined. The rule that no agency is automatically entitled to an injunction based upon a mere allegation of past misconduct is also definitively settled by this Court. *See Hecht v. Bowles*, 321 U.S. 321, 329 (1944); *see also Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975).

An enforcement agency may obtain an injunction in any federal district court to prevent violations or likely violations of the law upon a "proper showing." *See, e.g.*, 15 U.S.C. §§ 77t(b), 78u(d)(1); 2 U.S.C § 437g(a)(6)(B). A "proper showing" is made by demonstrating to the district court that there is a "reasonable expectation" that the defendant's past illegal activities will be repeated. *Fehn*, 97 F.3d at 1295-96. The enforcement agencies may prove a "reasonable expectation" by reference to "the totality of the circumstances surrounding the defendant and his [past] violations." *Id.* (citation omitted). The totality of the circumstances is assessed in light of, *inter alia*, the isolated

or recurrent nature of the defendant's prior infractions.[1/] *Id.* at 1295-96.

There is no *per se* rule requiring the issuance of an injunction upon the showing of a past violation, although past violations might give rise to an inference that there will be future violations. *Id.* at 1295. However, the elements predicating injunctive relief nonetheless must be satisfied.

The FEC made no attempt in this litigation to satisfy any of these criteria. Had it been able to do so, it is clear that its jurisdictional statute, the Supreme Court's holding in *Cope* and the court of appeals holding below could have allowed it to seek and obtain injunctive relief where past unlawful conduct is continuing or present unlawful conduct is likely, notwithstanding that it could not obtain penalties, fines or other remedies at law. *Compare Hecht v. Bowles, supra*. As for the instant case, these concerns are misplaced, and the Ninth Circuit's ruling should remain in force.

[1/]The other factors bearing on a finding that a defendant is likely to commit future violations of the law include: (i) the degree of scienter involved; (ii) a defendant's recognition of the wrongful nature of his conduct; (iii) the likelihood, because of a defendant's professional occupation, that future violations might occur; and (iv) the sincerity of his assurances against future violations. *Fehn*, 97 F.3d at 1295-96 (citing *Murphy*, 626 F.2d 633). *See also Furgatch*, 869 F.2d at 1263 n.5 (citing *Murphy*, 626 F.2d 633).

II. THE COURT OF APPEALS PROPERLY HELD THAT THE STATUTE OF LIMITATIONS, 28 U.S.C. § 2462, SHOULD NOT BE TOLLED BECAUSE MATERIALS FROM WHICH A CASE AGAINST RESPONDENT COULD HAVE BEEN PREPARED WERE IN THE HANDS OF PETITIONER, THE FEDERAL ELECTION COMMISSION THROUGHOUT THE STATUTORY LIMITATIONS PERIOD, AND PETITIONER COULD NOT MAKE OUT A CASE OF FRAUDULENT CONCEALMENT.

As noted, the court of appeals held that § 2462 was subject to equitable tolling. *Williams*, 104 F.3d at 240. However, it also held that the FEC had failed to satisfy any of the requisite elements for tolling to apply in this case. *Id.* at 241 (citing *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981)).[2/] In particular, the court held that the filing of campaign

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[2/]The FEC poses the question presented in a way that could distort the holding and effect of the court of appeal's decision. According to the FEC (Petition at I), the issue is "whether, when a defendant fraudulent conceals willful violations . . . the [FEC] is deemed, as a matter of law, to have notice sufficient to commence the running of the statute of limitations from routine reports filed with it that do not disclose the violations." The court of appeals, however, never held that respondent had fraudulently concealed anything. To the contrary, it held specifically that the FEC had failed to prove any of the requisite elements for tolling including fraudulent concealment. What the FEC is really saying is that any violation automatically involves fraudulent concealment. If that were the case, the distinction in the law that allows tolling would be rendered a nullity.

finance reports gave the FEC "notice of facts that, if investigated, would indicate the elements of a cause of action." *Id.* (citation omitted.) Moreover, well within the statutory period, the FEC received a complaint particularly describing the allegedly-unlawful conduct at issue.

There is nothing about the FEC's presentation that suggests that its position meets the criteria for the granting of a petition for certiorari; there is no arguable split among the circuits on the subject and it raises a trivial, not important, question of federal law.[3/] In any event, the FEC's argument is unworthy of logical or legal acceptance because, taken to its natural conclusion, it stands the statute of limitations on its head. As it did before the court of appeals, the FEC again argues that it doesn't have the time or resources to investigate the factual basis behind every campaign report furnished to it. This, of course, begs the question of why the FEC did not act with greater timeliness over the many months it had the complaint, to bring a viable case within the statutory limitations period.

Even more to the point, if the Court were to accept this argument, any case in which the FEC did not exercise due diligence would be turned into a fraudulent concealment case tolling the statute of limitations, effectively negating it save for the improbable circumstance in which the filer of an FEC report containing otherwise complete information concerning donors and amounts also states that the report should be subject to immediate investigation. That is the

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[3]The FEC's argument, based upon a lack of investigative resources, would better be made to the Office of Management and Budget and the Congress.

logical upshot of the FEC's position, and it should be rejected out of hand.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL ELECTION COMMISSION, PETITIONER

v.

LARRY R. WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. Respondent does not seriously dispute that the decision in this case conflicts with other appellate decisions. In holding that the statute of limitations that applies to actions "for the enforcement of any civil fine, penalty, or forfeiture" (28 U.S.C. 2462) also governs actions seeking injunctive relief, the decision of the court of appeals conflicts with the decisions of "several circuits" (Br. in Opp. 6). See Pet. 18-19 & n.3. In particular, the decision in this case squarely conflicts with the decision of the Eleventh Circuit in *United States* v. *Banks*, 115 F.3d 916, 919 & n.6 (1997), petition for cert. pending, No. 97-602 (filed Oct. 2,

1997), which held that "section 2462 does not apply to equitable remedies."

In the face of this manifest conflict of decisions, respondent does not even attempt to justify the decision below on its own terms. To the contrary, respondent admits that (Br. in Opp. 4):

> [i]n cases where an enforcement agency * * * can show continuing misconduct, or a substantial likelihood of present misconduct, it could * * * obtain injunctive relief, notwithstanding the unavailability of fines or damages.

Declining to attempt to justify the reasoning applied by the court below, respondent instead offers a new rationale that was not raised or addressed in the court of appeals. Respondent contends that an injunction was not proper in this case because there was "no showing of any likelihood of recurrence of misconduct" and thus no evidentiary basis for equitable relief to have been awarded (*ibid.*). That new assertion is both untimely and incorrect.

a. The court of appeals, of course, did not address whether a sufficient evidentiary basis existed for injunctive relief in this case. Instead, the court of appeals held that the statute of limitations had expired before the suit was commenced. Having concluded that the case "was untimely and should have been dismissed" (Pet. App. 9a), the court of appeals never addressed whether injunctive relief would have been an appropriate exercise of equitable discretion on the record of this case. The only issue addressed by the court of appeals was whether the suit "was untimely" (*ibid.*). Certiorari should be granted on that issue for the reasons set forth in detail in the petition (Pet. 10-19).

Respondent did not contend in his brief in the court of appeals that there was no sufficient evidentiary basis for an injunction in this case. The first time that respondent made such an assertion was in response to the petition for rehearing that the government filed after the court of appeals entered its decision. Because of its ruling on the statute of limitations issue, the court of appeals had no occasion to address the new rationale belatedly urged by respondent. It is "inappropriate" for respondent to seek to raise this new claim in this Court "in the first instance." *Ramsey* v. *United Mine Workers*, 401 U.S. 302, 312 (1971). See also *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. In any event, respondent is simply wrong in asserting that there is no evidentiary basis for the award of injunctive relief in this case. In entering the injunction, the district court noted that respondent's scheme was an obvious violation of the federal campaign contribution limitations and that "there is no doubt [respondent] knew of the Act's prohibitions" (Pet. App. 19a). Despite this clear evidence that respondent had committed numerous willful violations of the Act (*ibid.*), respondent nonetheless expressed the "continuing belief he committed no wrong-doing" (*id.* at 20a).[1] It was this total absence of any indication of "repentance and reform" (*United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333

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[1] The evidence on which the district court relied in awarding injunctive relief included respondent's sworn assertion that he did "not believe" his actions to have been unlawful and that he was "unable to comprehend" how his conduct was in violation of the Act (Excerpts of Record G, ¶ 18).

(1952)) that led the district court to conclude that it should enjoin respondent "from similar violations of the Act for a period of 10 years" (Pet. App. 19a-20a).

In the exercise of its equitable discretion, the district court reasonably concluded that injunctive relief was appropriate "based on" respondent's untenable assertions of innocence in the face of clear evidence of his "wrong-doing" (Pet. App. 20a). See, *e.g.*, *SEC* v. *Fehn*, 97 F.3d 1276, 1295 (9th Cir. 1996) (a "factor" to consider in determining whether injunctive relief is appropriate is "the defendant's recognition of the wrongful nature of his conduct"), cert. denied, 118 S. Ct. 59 (1997); *SEC* v. *Murphy*, 626 F.2d 633, 655 (9th Cir. 1980) ("[t]he existence of past violations may give rise to an inference that there will be future violations").[2] Respondent's contention that "no showing" was made "of any liklihood of recurrence of misconduct" (Br. in Opp. 4) simply ignores the reasoning and holding of the district court in awarding injunctive relief in this case.[3]

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[2] As respondent concedes (Br. in Opp. 8-9 & n.1), it is these very factors that are identified as governing the availability of injunctive relief under the appellate decisions on which he relies.

[3] Respondent asserts that statements by government counsel in the court of appeals constituted a "concession" that the government "had no reason to conclude" that respondent was likely to violate campaign contribution limitations again in the future (Br. in Opp. 1). Respondent provides no citation for that assertion. Respondent also fails to provide a citation for any of the similar assertions made elsewhere in his brief (*id.* at 3, 4). We are informed that government counsel made no such "concession" in the court of appeals and instead advised that court of the evidence on this issue on which the district court relied. See Pet. App. 19a-20a; Excerpts of Record G, ¶ 18; note 1, *supra*.

In any event, respondent's new factual assertion provides no support for the ruling of the court of appeals. The court of appeals did not address or rely on the contention that an inadequate showing of a "likelihood of recurrence" had been made. Instead, the court of appeals concluded that the statute of limitations on actions "for the enforcement of any civil fine" (28 U.S.C. 2462) bars this equitable action for injunctive relief. The sole rationale offered by the court was that, "because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both" (Pet. App. 5a). That reasoning is obviously unrelated to the new factual contention that respondent now advances.

In holding that this equitable action is barred by 28 U.S.C. 2462, the decision of the court of appeals creates a direct conflict among the circuits on an important and recurring question of federal law. See Pet. 10-19. Review by this Court is therefore warranted.

2. The court of appeals correctly noted that the statute of limitations "for the enforcement of any civil fine" (28 U.S.C. 2462) "is subject to equitable tolling" for fraudulent concealment of facts (Pet. App. 7a). The court erred, however, in holding that routine campaign finance reports "are, as a matter of law, sufficient" to give the Commission notice of violations and that such reports therefore commence the running of the limitations period (*ibid.*). As Judge Fletcher noted in dissent, that ruling improperly presupposes that the Commission has the authority and resources "to investigate every report, even though nothing on its face indicates illegal activity" (*id.* at 11a). By allowing the statute of limitations to run even when (as in the present case) the routine

reports filed with the Commission fail correctly to describe the underlying transactions (Pet. 22 n.6), the decision of the court of appeals drastically undermines the Commission's ability to enforce the federal campaign contribution laws. The court's ruling ensures that (Pet. App. 12a (Fletcher, J., dissenting))

> those who are most clever in deceiving the FEC and concealing their illegal contributions will be the least likely to be prosecuted successfully * * *.

Respondent suggests that the Commission could solve the problem created by this aspect of the court's decision simply by asking Congress for more "investigative resources" (Br. in Opp. 11 n.3). That suggestion fails, however, to give consideration to the enormous and unrealistic commitment of "resources" that would be required. As Judge Fletcher noted, to avoid the consequences of the decision in this case the Commission would be required "to investigate every report" filed with it (Pet. App. 11a). Congress plainly did not intend for that to occur, however, for it empowered the Commission to investigate possible violations only when a majority of its members determines that there is "reason to believe that a person" has violated the Act. 2 U.S.C. 437g(a)(2). The sort of roving investigative authority contemplated by the decision in this case simply does not exist. See Pet. 23-24.

The decision of the court of appeals thus has the direct consequence of ensuring that all but the most obvious violations of the federal campaign contribution limitations will go unsanctioned. As respondent notes (Br. in Opp. 10), there is as yet no conflict among the circuits on this second aspect of the

court's decision. Nevertheless, review of the second question presented in this case is warranted by the importance of that issue to the routine enforcement of the federal campaign contribution laws and by its interrelationship with the first question presented, on which there is a direct conflict among the circuits.

* * * * *

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

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